



Issue Date: 02 March 2011

BALCA Case No.: 2010-PER-00348
ETA Case No.: A-07260-75939

In the Matter of:

DELOITTE SERVICES LP,
Employer

on behalf of

PRADEEPKUMAR RATILAL SINGAPURI,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Jonathan C. Adams, Esquire
Fragomen, Del Rey, Bernsen & Loewy LLP
Philadelphia, Pennsylvania
For the Employer

Gary M. Buff, Associate Solicitor
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Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **Romero, Price, and Rosenow**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).

BACKGROUND

On September 28, 2007, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "Senior SAP Basis Technology Analyst." (AF 191-206).¹ Within its application, Employer attested that one of the three additional recruitment steps it took to promote this professional position was advertising with its employee referral program from June 25 to July 10, 2007. (AF 195). On November 15, 2007, Employer was notified that its ETA Form 9089 was selected for audit. (AF 187-190). The Audit Notification directed Employer to submit, among other records, "[r]ecruitment documentation as outlined in 656.17(e)." (AF 188). Employer responded on December 13, 2007, and attached a screenshot of its internal job-posting website, "Staffing WebTop," showing the dates the posting opened and expired. (AF 134-186).

On May 22, 2009, the CO denied certification of Employer's application for three reasons, the second of which was that Employer failed to provide adequate documentation of its additional recruitment steps, in violation of 20 C.F.R. § 656.17(e)(1)(ii)(G). (AF 131-133). The CO found that Employer failed to provide dated copies of employer notices or memoranda advertising the program and specifying the incentives offered, as required by Section 656.17(e)(1)(ii)(G). On June 18, 2009, Employer requested reconsideration and argued that its submission of the screenshot was sufficient to fulfill the regulation's requirement of dated copies of employer notices. (AF 3-130). Additionally, Employer provided website printouts describing its talent referral program, "Refer Potential Movers and Shakers." (AF 27-43).

The CO determined that Employer's request did not overcome all deficiencies noted in the determination letter thus forwarded the case to BALCA on February 12, 2010. On March 11, 2010, BALCA issued a Notice of Docketing. Employer filed a Statement of Intent to Proceed on March 25, 2010, and attached the brief it previously submitted with its request for reconsideration. On April 26, 2010, the CO filed a Statement of Position asserting that Employer's failure to submit timely the appropriate

¹ In this decision, AF is an abbreviation for Appeal File.

documentation, as required by 20 C.F.R. § 656.17(e)(1)(ii)(G), was a fatal defect under 20 C.F.R. § 656.24(g)(2).

DISCUSSION

An employer who files an Application for Permanent Employment Certification under the basic labor certification process must attest to having placed a SWA job order and two print advertisements in newspaper or professional journals prior to filing the application. 20 C.F.R. § 656.17(e)(1)(i). Employers filing an application for professional occupations must conduct three additional recruitment steps. 20 C.F.R. § 656.17(e)(1)(ii). One of the additional recruitment steps an employer can utilize is an employee referral program with incentives. This recruitment step “can be documented by providing dated copies of employer notices or memoranda advertising the program and specifying the incentives offered.” 20 C.F.R. § 656.17(e)(1)(ii)(G). A substantial failure by the employer to provide required documentation will result in that application being denied. 20 C.F.R. § 656.20(b).

An employer is permitted to request reconsideration of a denied certification, but such request may include only:

- (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
- (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of § 656.10(f).

20 C.F.R. §§ 656.24(g)(2)(i), (ii). This regulation provides that the CO will consider additional documentation submitted with an employer’s request for reconsideration only if the employer did not have the opportunity to submit it previously and if it was

maintained to support the application for labor certification. *See Denzil Gunnels d/b/a/ Gunnels Arabians*, 2010-PER-628 (Nov. 16, 2010).

The record clearly demonstrates that Employer failed to meet the regulatory requirements of Section 656.17(e)(1)(ii)(G). Employer indicated in its application that one of the three additional recruitment steps it took to advertise the position of Senior SAP Basis Technology Analyst was to use its employee referral program with incentives. Within its audit response, however, Employer failed to include “dated copies of employer notices or memoranda *advertising the program and specifying the incentives offered.*” *See* 20 C.F.R. § 656.17(e)(1)(ii)(G) (emphasis added). Employer submitted only a screenshot of its internal job-posting website showing the dates the posting opened and closed. Employer did not submit any documentation advertising the program or its specific incentives; yet, Employer had the opportunity to present such documentation to the CO previously and should have done so in response to the Audit Notification. The additional documentation Employer submitted with its request for reconsideration is evidence not previously submitted, within the meaning of Section 656.24(g)(2), and therefore cannot be used in support of a motion for reconsideration (or review). *See Shogun at Bey Lea*, 2006-PER-00059 (Oct. 10, 2006). As such, we find that Employer’s failure mandates denial of the certification.

Still, Employer maintains that it satisfied the documentation requirement because the regulations state that documentation of the employee referral program “can” (as opposed to “shall”) be provided by dated copies of employer notices “or” memoranda advertising the program and specifying the incentives offered. Given the “or” contained in the regulatory language, Employer argues that it reasonably believed it had adequately demonstrated its reliance upon its employee referral program as one of the three additional professional recruitment steps. Nevertheless, the regulation certainly notifies employers that the specifics of the program’s incentives as well as the dates the program was advertised are elements of adequate documentation. *Ove Arup & Partners Consulting Engineers, PC*, 2010-PER-00013 (July 20, 2010).

Based on the foregoing, we affirm the CO’s denial of labor certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

A

Larry W. Price
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.